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In the Supreme Court of the United States

MARK J. SHERIFF, SARAH SHERIFF, WILES BOYLE, BURKHOLDER & BRINGARDNER CO., LPA, AND MICHAEL DEWINE, ATTORNEY GENERAL OF OHIO, PETITIONERS

v.

PAMELA GILLIE AND HAZEL MEADOWS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 11 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Dictionary Act's definition of "officer" unambiguously exclude all private contractors, such that the special counsel appointed by Ohio's Attorney General to undertake his duty to collect debts owed to the State are not state "officers" for purposes of the Fair Debt Collection Practices Act?

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INTEREST OF *AMICI CURIAE*

The Constitution itself establishes our dual system of government, which divides power "between the National Government and the States." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011). This federalism is important because dividing governmental power "secures the freedom of the individual" as part of our constitutional system of "checks and balances." *Id.* at 2364–65. Federal intrusion into state sovereignty is thus of paramount concern for States and State Attorneys General.

Part of the liberty protected by federalism is the freedom of citizens to define "the structure of [State] government [ ] and the character of those who exercise government authority." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). This sovereignty allows States to carry out their core functions with pragmatism and flexibility. The Sixth Circuit's overly narrow interpretation of the Dictionary Act's definition of "officer" violates an important canon designed to preserve federalism: the clear-statement rule. This canon protects against the erosion of state authority—and the concomitant dilution of each individual's ability to influence public policy—without a clear congressional directive. Because the Act's definition of "officer" does not plainly exclude private contractors who are carrying out state sovereign duties under the authority of state statute, the decision below encroaches on States' flexibility to determine how to best govern themselves and thus warrants review.

INTRODUCTION AND SUMMARY OF ARGUMENT

When this Court was deciding *Gregory*, thirteen states signed on to an *amicus* that supported the clear-statement rule. Brief for Colorado & Florida et al. as *Amici Curiae* Supporting Respondent, *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991) (No. 90-50). Those States were concerned about maintaining a proper federal-state balance. This Court agreed, justifying the rule on that very basis. *Gregory*, 501 U.S. at 460.

That same principle is at stake here. The Fair Debt Collection Practices Act (FDCPA) relies on the Dictionary Act definition of "officer," defined as "any person authorized by law to perform the duties of the office." 1 U.S.C. § 1 (2012). This definition encompasses the special counsel that Ohio's Attorney General appoints to assist in debt collection. These special counsel are not *mere* independent contractors. By virtue of the Ohio statute that authorizes their hire and the duties they perform, they stand in the shoes of the Ohio Attorney General for debt-collection purposes. The opinion below, which nonetheless holds that they are not officers who wield any sovereign power, Pet. App. 43a, violates the clear-statement rule and limits States' authority to decide whether and on what terms they hire private contractors to assist them in their sovereign duties.

Private contractors serve States in various capacities. To be sure, not every private contractor is an officer. Indeed, not every private contractor is "authorized by law," and as Judge Sutton noted in dissent, "sovereign power remains a precondition of officer status." Pet. App. 62a. So, irrespective of the importance

of their work, no one presumes building-maintenance or road-construction workers are standing in the shoes of a state official. But where the "authorization" and "duty" conditions are met, States that exercise their sovereign power through independent contractors are entitled to benefit from those contractors having state-officer status. This is true whether in debt collection or in other areas where federal statutes use the Dictionary Act definition of "officer."

The rule embodied in the opinion below also undermines the authority of State Attorneys General. They must have the flexibility to delegate their powers to outside counsel and duly designated deputies. And they are entitled to applicable exemptions such as the state-officer exemption under the FDCPA.

The FDCPA's state-officer exemption serves as a critical tool for States as they respond to increasingly complex tax structures and fiscal challenges. A number of States use private contractors to collect debts, and a number of State Attorneys General appoint special counsel for this purpose. Because Congress has not spoken clearly in the FDCPA to cover States, they are entitled to structure their debt-collection activities so their private contractors qualify as "officers." States have the sovereign right to determine if and how they will collect the debts owed to them. Pet. App. 55a.

This Court should reverse the Sixth Circuit and hold that the Fair Debt Collection Practices Act does not apply to private contractors who are authorized by law to perform state sovereign functions.

ARGUMENT

I. Courts should not interpret statutes as altering the federalism balance unless Congress expressly states that intent.

Federalism arises from the Constitution itself. "As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory*, 501 U.S. at 457. The Constitution balances the power between these two sovereignties, reserving to the States or to the people all powers the Federal Compact has not delegated to the United States. U.S. Const. amend. X. Justice Story described the Tenth Amendment as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 J. Story, Commentaries on the Constitution of the United States 752 (1833).

Federalism exists to protect and promote individual liberty. The authors of *The Federalist* recognized this, specifically noting the value of federalism in curbing abuses of governmental power. Alexander Hamilton wrote that while the general government would check the "usurpations of the state governments, the state governments "will have the same disposition towards the general government." *The Federalist* No. 28, at 179 (A. Hamilton) (J. Cooke ed. 1961). James Madison likewise explained, "The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961). States,

Madison emphasized, retain powers that are "numerous and indefinite." *Gregory*, 501 U.S. at 457–58 (quoting *The Federalist* No. 45, at 292–93 (James Madison) (Clinton Rossiter ed. 1961)).

This Court too has repeatedly explained that "[f]ederalism secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364. Indeed, "[s]tate sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' " *Id.* (quoting *New York* v. *United States*, 505 U.S. 144, 181 (1992) (some internal quotations omitted)). Federalism advances liberty in a number of ways:

- it promotes "decentralized government that will be more sensitive to the diverse needs of a heterogeneous society";
- it "increases opportunities for citizen involvement in democratic processes";
- it "allows for more innovation and experimentation in government";
- it "makes government more responsive by putting the States in competition for a mobile citizenry"; and
- it provides "a check on abuses of government power." *Gregory*, 501 U.S. at 458.

Because of the importance of federalism to our constitutional structure, this Court applies a clear-statement rule when interpreting statutes: "[I]f Congress intends to alter the 'usual constitutional balance

between the States and the Federal Government, it must make its intention unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. at 460–61 (quoting *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985)). The burden is on Congress to use unambiguous and targeted statutory language. Courts may not consider less clear indicia of legislative intent or place their own overlay onto the statutory language.

A. The clear-statement rule protects the balance between the States and the federal government.

The clear-statement rule safeguards the important value discussed above: preserving the federal-state balance. Indeed, this Court explained that "congressional interference" in state internal matters of great importance "would upset the usual constitutional balance of federal and state powers." *Gregory*, 501 U.S. at 460.

In numerous cases both before and after *Gregory*, this Court has applied the clear-statement rule to protect States from unwarranted federal encroachment into traditional areas of state authority. See, e.g., *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality opinion) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority"); *Gonzales* v. *Oregon*, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system [ ] belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power."); *Solid Waste Agency of N. Cook, Cty.* v. *U.S. Army Corps of Eng'rs*,

531 U.S. 159, 173 (2001) ("This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) ("[W]hen the Federal Government takes over local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit.") (internal citations omitted); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of a clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

B. The opinion below disregards the clear-statement rule and limits the States' authority to deputize contractors to assist in core state duties.

"[W]ho can deny that plaintiffs' interpretation of 'officer' 'trench[es] on the States' arrangements for conducting their own governments?' " Pet. App. 58a (Sutton, J., dissenting) (quoting *Nixon* v. *Mo. Mun. League*, 541 U.S. 125, 140 (2004)). Yet, any such federal legislation should be "treated with great skepticism" and, in the absence of an " 'unmistakably clear' " statement otherwise, should be "read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 1410.

Yet the Sixth Circuit majority ignored the States' important authority to structure themselves when it concluded that appointed special counsel cannot be officers of the State within the meaning of the FDCPA. Pet. App. 29a. This conclusion is not only erroneous but also conflicts with the approach of the only other circuit to address the issue, the Third Circuit, which held that the Philadelphia Municipal Court's appointed Landlord and Tenant Officer was an "officer." *Heredia* v. *Green*, 667 F.2d 392, 396 (3d Cir. 1981). Both *Heredia* and the dissent here recognized that adherence to the clear-statement rule protects fundamental federalism principles.

Further, the decision below misses the point of the clear-statement rule—that it applies when ambiguity exists and resolves ambiguity in favor of preserving state sovereignty. If the Dictionary Act's definition of "officer" is ambiguous in a particular context—and here, Plaintiffs conceded that the term was "open to multiple[] yet reasonable interpretations," Pet. App. 60a—then the exemption for state officers applies precisely because Congress has not *un*ambiguously regulated core state functions. Pet. App. 58a (Sutton, J., dissenting). As this Court has articulated, the clear-statement rule "resolves ambiguities in federal statutes" based on basic principles of federalism. *Bond*, 134 S. Ct. at 2090. Because the Sixth Circuit failed to follow the rule, it fell into the very peril this Court has identified: " 'to give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* [v. *United States*, 105 S. Ct. 479 (1984)] relied to protect states' interests.' " *Gregory*, 501 U.S. at 464 (quoting L. Tribe, American Constitutional Law § 6-25, at 480

(2d ed. 1988)); *Wisconsin Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 607 (1991) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (" 'Mere silence cannot suffice to establish a clear and manifest purpose to pre-empt local authority.' ")).

C. The decision below encroaches on the authority of State Attorneys General.

There is another reason why the opinion below matters to States other than Ohio. State Attorneys General must have the flexibility to delegate their powers to outside counsel and duly designated deputies—and accordingly, to balance any inherent liability with the benefits of any applicable exemptions such as the FDCPA's state-officer exemption.

The office of attorney general dates back to thirteenth and fourteenth century England when the *attornatus regis* served as the sovereign's primary legal representative and wielded considerable power that was subject to limitation only by the King. That office was carried over to colonial America as the office of attorney general. William C. Haflett, Jr., *Tice v. Department of Transportation: A Declining Role for the Attorney General?*, 63 N.C. L. Rev. 1051, 1053, (1985). As a state judge reminded, "[O]ne of the principal reasons that our founders established an Attorney General's office was to assure that important legal issues that will affect all state agencies had an advocate who is able to bring the expertise of government-wide representation before this Court, when we consider matters of overall importance to state government." *West Virginia Div. of Envtl. Protection* v. *Kingwood Coal*

Co., 490 S.E. 2d 845 n.1 (W. Va. S. Ct. App. 1997) (Starcher, J., dissenting).

Whether by constitution or by statute, all fifty states have an office of attorney general, and most recognize the Attorney General's considerable common-law powers. 7 AM JUR 2D *Attorney General* § 7 (2015). In almost every state, the Attorney General is the chief law officer. See, e.g., *Hodge* v. *Commonwealth*, 116 S.W.3d 463, 474 (Ky. 2003) (noting that "the Attorney General is the chief law officer and chief prosecutor of the Commonwealth").

Because of heavy workloads and responsibilities spanning a host of issues, State Attorneys General must often delegate their authority to outside counsel. 7A C.J.S. *Attorney General* § 25 (2015) ("[A] state statute may allow the attorney general to employ special counsel on a fee or salary basis," subject to certain constraints on supervision and control.). Ohio might want to appoint special counsel to represent the state in proceedings in which the state is a party, to act as an attorney at law in an antitrust case, or to act as a prosecuting attorney in organized crime cases. Pet. App. 59a (Sutton, J., dissenting) (citing statutes).

In the same way, Michigan law repeatedly authorizes its Attorney General to delegate his authority to special counsel and to other persons. *Dearborn Fire Fighters Union, Local No. 412, I.A.F.F.* v. *City of Dearborn*, 231 N.W.2d 226, 261 (Mich. 1975) (recognizing that the Attorney General may "appoint a learned lawyer as a Special Assistant Attorney General" and that "[i]t would be difficult to say that that Special Assistant Attorney General was not a public officer").

Numerous state statutes recognize this. To give just a few examples, the Michigan Attorney General may:

(1) "employ counsel to be associated with him" "who, with him, shall fully represent the state" in actions to protect or assert the right or title of the state to property, Mich. Comp. Laws § 21.162;

(2) appoint a special prosecuting attorney to perform the duties of a prosecuting attorney who is disqualified or otherwise unable to serve, Mich. Comp. Laws § 49.160;

(3) designate "other person[s]" to conduct investigations, Mich. Comp. Laws § 400.291(2);

(4) appoint a "special assistant attorney general" to represent the insurance commissioner, Mich. Comp. Laws § 500.214(4);

(5) "assign an independent special assistant attorney general who is under contract to the department of attorney general and is not a member of the state classified civil service" to advise and assist disciplinary subcommittees under the Public Health Code, Mich. Comp. Laws § 333.16237(2); and

(6) appoint special counsel to represent an employee of the Friend of the Court, Mich. Comp. Laws § 691.1408; see also 1985–1986 Mich. Op. Att'y Gen. 72.

In many States, special counsel bring suits on behalf of the citizens of their States that would otherwise be impossible due to a lack of personnel resources, expertise, and money. Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J. L. & Soc. Probs. 587, 588 (2009). As an example, Rhode Island's former Attorney General used private attorneys to represent that State in a fight against lead paint manufacturers. *Id.* at 589 (discussing *State* v. *Lead Indus. Ass'n Inc.*, 951 A.2d 428 (R.I. 2008)). As another, Oklahoma's former Attorney General similarly retained three plaintiffs' attorney firms to take on poultry companies he believed had polluted the State's waterways with chicken manure. *Id.* (discussing *State of Oklahoma ex rel The Pollution Control Coordinating Bd* v. *Kerr-McGee Corp*, 619 P.2d 858 (Okla. 1980)).

Ohio, Michigan, Oklahoma, and Rhode Island are not anomalies. At least 31 State Attorneys General have statutory authority to delegate their duties to special counsel. ALA. CODE § 36-26-42; ALASKA STAT. ANN. § 44.17.010; ARIZ. REV. STAT. ANN. § 41-192(A)(6); ARK. CODE ANN. § 25-16-702(b)(2); CAL. GOV'T CODE § 12520; CONN. GEN. STAT. ANN. § 3-125; DEL. CODE. ANN. tit. 29, § 2507; GA. CODE ANN. § 45-15-30; HAW. REV. STAT. ANN. § 28-8(b); IDAHO CODE ANN. § 67-1406(3); IOWA CODE ANN. § 13.7(1); LA. STAT. ANN. § 49:251.2; ME. REV. STAT. ANN. TIT. 5, § 191(3)(B); MD. CODE ANN. § 6-105(b)(1), (c)(1); MICH. COMP. LAWS §§ 14.29, 21.162, 333.16237(2); MISS. CODE ANN. § 7-5-7(2)(a); NEV. REV. STAT. ANN. § 41.03435; N.J. STAT. ANN. § 52:17A-13; N.Y. EXEC. LAW § 62(1); OHIO REV. CODE ANN. § 109.07; OKLA.

STAT. ANN. TIT. 74, § 20i(A)(3); OR. REV. STAT. ANN. § 180.235(1); 42 R.I. GEN. LAWS ANN. § 42-9-11, TENN. CODE ANN. § 8-6-106; TEX. BUS. & COMMERCE CODE ANN. § 15.40(b); UTAH CODE ANN. § 67-5-5; VT. STAT. ANN. TIT. 3, § 153(c); VA. CODE ANN. § 2.2-507(C); WASH. REV. CODE ANN. § 43.10.065; W VA. CODE ANN. § 5-3-2a(d); WYO. STAT. ANN. § 9-1-606(b). The widespread authority of Attorneys General to delegate their authority, and the benefits of state-officer status—whether in debt collection or in other areas—should not be diminished without a clear statement to the contrary.

D. The dissent's interpretation of "officer" is not a slippery slope that encompasses all who contract with the State.

The opinion below broadly proclaims that "[i]ndependent contractors are not officers under the plain language of the Dictionary Act." Pet. App. 43a. Of course, not all private contractors are state officers, nor would States want all of them to be. But the opinion's statement is incorrect because it leaves no room for the necessary analysis: whether the private contractor is "authorized by law" and is performing "the duties of the office." 1 U.S.C. § 1.

Compare two contractors: the State hires a groundskeeper to maintain the lawn by its capitol and also hires a special assistant attorney general to assist in major tobacco litigation. Both perform important work and add value to the State. But the former is not authorized by statute, his job tasks are not core state functions, and he is not subject to the same level of control and oversight as the Attorney General's delegate in court.

In the case of Ohio's special counsel, this control was exhibited in the use of Attorney General letterhead and the adoption of Attorney General protocols. Ohio special counsel *are*, contrary to the majority opinion, distinguishable "from the myriad of independent contractors who enter into for-profit agreements with government agencies or actors to help fulfill the duties of some government office." Pet App. 29a.

In analogous contexts, this Court has not treated all persons fulfilling some state task as officers of the State; instead, it has analyzed the nature of the relationship with the government. Consider questions of immunity. This Court has said that types of immunity (i.e., absolute versus qualified) "rest[] on functional categories, not on the status of the defendant." *Briscoe* v. *LaHue*, 460 U.S. 325, 342 (1983). And this Court has explained that private citizens may be entitled to immunity for actions taken while performing government operations. For example, grand jurors, though private citizens, have long enjoyed absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409, 423 n.20 (1976).

Similarly, just three years ago this Court granted qualified immunity to a private attorney temporarily retained by a city to carry out its work. *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1665 (2012). In determining that this non-city employee was entitled to protection from suit under § 1983, the Court noted that at the time Congress enacted § 1983 the common law did not distinguish between government employees and private actors serving the government. *Id.* at 1661-1665. Indeed, "[e]xamples of individuals receiving immunity

for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of the government itself'—from store owners acting as federal postmasters and private lawyers conducting criminal prosecutions on behalf of the State to individuals acting as part-time judges, justices of the peace, sheriffs, and constables. *Id.* at 1663-1665. In concluding that "immunity under § 1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis," this Court explained that such immunity " 'protect[s] government's ability to perform its traditional functions,' " "ensur[es] that talented candidates are not deterred from public service," and avoids "significant line-drawing problems" that temporary relationships with the government might otherwise raise. *Id.* at 1665-1666 (citations omitted).

Of course, these immunities apply only to private citizens who are performing a government function and who meet the relevant legal tests. See *Filarsky*, 132 S. Ct. at 1669 (Sotomayor, J., concurring) ("[I]t does not follow that *every* private individual who works for the government in some capacity necessarily may claim qualified immunity Such individuals must satisfy our usual test for conferring immunity."). Lower courts applying *Filarsky*, for example, have certainly recognized this distinction. See, e.g., *Gomez* v. *Campbell-Ewald Co.*, 768 F.3d 871, 881(9th Cir. 2014) (refusing to extend *Filarsky* outside the personal-tort-liability context); *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326, 344 (4th Cir. 2014) (refusing to extend *Filarsky* to sovereign-immunity issues or analysis of the Federal Tort Claims Act's discretionary-function exception). So too do only certain

private contractors function in a capacity that is "authorized by law" to fulfill "the duties of office." 1 U.S.C. § 1.

Relatedly, governmental tort immunity applies to only some contractors. Nuanced inquiries into the specific duties and authority of contractors are important to the applicability of governmental tort immunity, where agencies retain immunity for government or public acts but not for acts that are merely proprietary or private in nature. 57 AM JUR 2D *Tort Liability* § 38 (2015). For example, Michigan cannot be held liable in tort for operation of a state ferry as part of the State's highway system because it is a governmental function. *Manion* v. *State Highway Comm'r.*, 5 N.W. 2d 527, 529 (Mich. 1942); see also Mich. Comp. Laws § 691.1413. Similarly, Kentucky courts have recognized that the State's protection and conservation of game is a governmental function and the State is "acting in its sovereign capacity for the common benefit of all of its people." *Commonwealth* v. *Masden*, 175 S.W.2d 1004, 1006 (Ky. 1943) (citing *Nicoulin* v. *O'Brien*, 189 S.W. 724 (1916) (other citations omitted)).

Even applying common-law agency principles requires fact-intensive inquiries to determine whether a private contractor is functioning as an agent in the first place. See Restatement (Second) of Agency § 2 cmt. b (1958) (an "independent contractor" may be "an agent *under appropriate circumstances.*") (emphasis added). Likewise, this Court's Eleventh Amendment arm-of-the-state doctrine also employs a fact-intensive, multi-factored balancing approach in determining when to extend the State's sovereign immunity to

other entities. See, e.g., *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977) (explaining that arm-of-the-state inquiry depends, in part, "upon the nature of the entity created by state law" and determining that the local school board was more like a county or city than an arm of the State because it was subject to some guidance from the State Board of Education and received a significant amount of money from the State); *Port Auth. Trans-Hudson Corp.* v. *Feeney*, 110 S. Ct. 1868, 1876–77 (1990) (Brennan, J., concurring) ("[T]he entity [must be] "so intricately intertwined with" [and] so closely tied to the state as to be the direct means by which the state acts.").

In sum, the distinctions among independent contractors matter under the Dictionary Act just as they do under other relevant legal tests. Under the Act, it is important under what authority they were hired and under what authority and protocols they perform their work. And it matters what work they do. The Sixth Circuit closed the door on the "officer" inquiry without adequately considering these meaningful distinctions.

II. Congress has not clearly limited States' ability to benefit from the officer exception for private contractors assisting in debt collection, and States need such broad tools to effectively manage their debt collection.

States have the sovereign authority to collect the debts owed them. As the dissent recounts, "From the founding, the States have taken debts—whether owed by them or to them—seriously." Pet. App. 55a (Sutton, J., dissenting). The States' interest in debt collection

is no mere "policy concern," as the majority opinion characterized it. Pet. App. 28a–39a. Rather, it is an important piece of the States' sovereign right to govern themselves in the way that best solves problems and meets the needs of its citizens. State fiscal concerns should not be artificially separated from collecting revenue. And debt collection is an important factor in revenue-building.

A. In varying degrees, all States delegate some of their sovereign debt-collection power to non-employees.

Recently, the National Association of State Auditors, Comptrollers, and Treasurers, in conjunction with CGI, a leading information technology and business process services firm, conducted a survey in the hopes of helping States seek effective ways to raise needed revenue. *Government Debt Collection: Survey Report and Recommendations* 1 (2010), *available at* http://www.cgi.com/sites/default/files/pdf/CGI-NASACT-report.pdf. The survey showed that, regardless of the type of system they employ, *every* one of the 50 states surveyed said they were using private collection agencies to some degree and "at some point in the process." *Id.* at 3–5.

Michigan for example, relies on private collection agencies to collect debts owed to state agencies. The State centralizes its debt collection through an Office of Collections in its Department of Treasury. This centralized Office collects all overdue assessed taxes administered by the Michigan Department of Treasury and primary delinquent, non-tax debts owed to almost all state agencies. In total, over 200 different state agencies and local units of government have referred

debts to the Office of Collections, and the Office collects over 325 debt types. Even though the Office employs a staff of approximately 85, state law still authorizes the Department of Treasury to "contract with private collection agencies and law firms to collect taxes and other accounts due this state." 2014 Mich. Pub. Act 252, Part 2A, anticipated appropriations for fiscal year 2015-2016, Sec. 20-903(1), Department of Treasury, "Operations." Notably, the private company Michigan uses, GC Services Limited Partnership, explains that when it sends letters to individuals whose accounts have been referred for collection, it notifies them that it is operating "on behalf of the State of Michigan" and that its employees at the Michigan Accounts Receivable Collection System "are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State." (Appendix A, sample letter).

Like Michigan, other States also hire contractors to aid in their debt-collection efforts. Louisiana authorizes its centralized Office of Debt Recovery to "contract with a third-party collection contractor for the collection of delinquent debt on behalf of the office." LA. STAT. ANN. § 47:1676(C)(3). Colorado, which also has a centralized system, COLO. REV. STAT. 24-30-202.4, requires the state controller to "legally assign all debts that are not claims in process of collection to private counsel or private collection agencies" within 180 days. *Id.* at § 24-30-202.4(2). Similarly, Utah's centralized Office of Debt Collection is authorized to "contract with private or state agencies to collect past-due accounts." UTAH CODE ANN. 63A-3-502(4)(d).

While California has a quasi-centralized debt-collection system, it too relies on private contractors to fulfill its debt-collection duties. The California Franchise Tax Board is the state agency responsible for collection of state personal income tax and bank and corporation tax, and is authorized to hire private contractors for debt-collection purposes. CAL. REV. & TAX CODE §§19376–19378. Although private contractors may not hold themselves out to be Franchise Tax Board employees, they may, by contract, say they are collecting on behalf of the Franchise Tax Board. The Franchise Tax Board is also authorized to collect delinquent debts on behalf of state and local courts and on behalf of the Department of Motor Vehicles, as if those debts were a tax. CAL. REV. & TAX CODE § 19280, § 10878. The California State Controller's Office reports that personal income taxes, sales and use taxes, and corporate income taxes make up the State's General Fund—the State's main checking account to fund state agency programs and state funds to local government. California State Controller's Office, State Taxes, *available at* http://sco.ca.gov/.

States with decentralized systems use private contractors as well. See, e.g., OKLA. STAT. ANN. TIT. 68, § 205.2(b); OKLA. STAT. ANN. TIT. 68, § 255(A). But regardless of how they structure their debt-collection practices, States, as constitutional sovereigns, should retain the flexibility to decide for themselves whether to appoint private contractors to complete the core task of debt collection.

B. Many States authorize their Attorney General to hire private individuals to assist in debt collection.

Like Ohio, many States authorize their Attorneys General to delegate their debt-collection authority. E.g. ALA. CODE § 40-2-11(4); ALASKA STAT. ANN. § 43.10.010(b); ARIZ. REV. STAT. ANN. § 41-191(E); ARK. CODE ANN. § 25-16-708a; CONN. GEN. STAT. ANN. § 4a-12(b); DEL. CODE ANN. tit. 6, § 2432A; GA. CODE ANN. § 10-1-382(a); KAN. STAT. ANN. § 20-379(c)(5); MISS. CODE ANN. § 7-5-7(2)(a); N.J. STAT. ANN. § 52:18-37; OHIO REV. CODE ANN. § 131.02; PA. STAT. AND CONS. STAT. ANN. § 732-204(c); TEX. GOVT. CODE ANN. § 2107.003. The complexity of state taxing structures and the need for robust state tax-collection programs underscore why States may need the flexibility to hire private contractors and to claim the state-officer exemption under the FDCPA.

States' debt-collection systems often reflect the complexity of their taxing structure. Consider Michigan. Between 2011 and 2014, Michigan reported collecting over 31 types of state taxes—taxes as diverse as casino gaming, oil and gas severance, horse-race wagering, liquor markup, property taxes, state education taxes, and airport parking excise taxes. Citizens Research Council of Michigan, Outline of the Michigan Tax System 85.[1] That number represents a dramatic increase from the 22 types of taxes reported during the years 1993–1996. *Outline of the Michigan Tax*

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[1] *Available at* http://crcmich.org/PUBLICAT/2010s/2015/ Tax %20Outline_ALL.pdf.

System, Report No. 322.[2] Increasing complexity demands state ingenuity and flexible tools.

In addition to their complexity, state tax structures are often in flux as state policy shifts and evolves. Michigan, for example, has in recent decades seen a shift from local taxation to state-level taxation in financing the State's K-12 school system.[3] The State has also expanded its own tax system through increased sales tax and a new real estate transfer tax. Michigan, as well as all States, must have the tools to keep pace with the changing tax landscape.

Why does this matter? In large part it matters because States must safeguard their fiscal health. States continue to face the repercussions of the recent economic downturn. Sarah Arnett, *State Fiscal Condition: Ranking the 50 States* 3 (Mercatus Center at George Mason University, Working Paper No. 14-02, 2014). Fiscal simulations by the Government Accountability Office, an independent agency that provides Congress with audit, evaluation, and investigative services, suggest concern for the long-term outlook for States' fiscal condition. (*Id.*, citing GAO 2013). States need revenue, and revenue is tied to effective debt collection.

Not surprisingly then, the National Association of State Auditors, Comptrollers and Treasurers has rec-

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[2] *Available at* http://www.crcmich.org/PUBLICAT/1990s/1997/rpt322.pdf.

[3] *Available at* http://crcmich.org/PUBLICAT/2010s/2015/Tax_Outline_ALL.pdf.

ommended that States must aggressively explore better ways to increase efficiency and raise revenue to maintain citizen services. *Government Debt Collection: Survey Report and Recommendations* 11. Its survey report observed that enhancing debt-collection tools and capabilities would likely increase revenues "by scores of millions of dollars each year." *Id.* In fact, according to the survey, a number of States are "considering expanding their delinquent debt collection programs to increase revenue from their accounts receivable as part of a balanced program for getting into, and staying in, fiscal shape." *Id.*

There are good reasons why robust state debt-collection programs are linked to increased revenue. First, robust enforcement discourages nonpayment of taxes. Most state tax systems are based on voluntary compliance by taxpayers, so enforcement is a necessary activity to recover tax receivables and keep voluntary reporting and payment from decreasing. If the State is viewed as being lax on enforcement, voluntary-compliance numbers are almost certain to drop. Second, robust enforcement reduces the tax burden for the millions of individual citizens and businesses who *do* comply with the tax laws. Third, robust enforcement benefits tax-paying businesses through minimization of the unfair competitive advantage gained by businesses that do not pay their taxes.

But innovative and robust efforts to collect debts often require increased state intervention. This, in turn, is likely to require the assistance of private contractors.

Whether in debt collection or beyond, States need the flexibility to use private contractors. Their decision to do so may depend on whether they can derive the benefits and protections available from federal statutes such as the FDCPA.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

MICHIGAN
ACCOUNTS RECEIVABLE COLLECTION SYSTEM
POST OFFICE BOX 30158
LANSING, MICHIGAN 48909

Date: December 8, 2014
Account No:
Contact Telephone No:
1-866-754-8649

Your account has been referred to the Michigan Accounts Receivable Collection System (MARCS), which is operated on behalf of the State of Michigan by GC Services Limited Partnership, a private debt collection company. GC Services Limited Partnership employees at the Michigan Accounts Receivable Collection System (MARCS) site are representatives of the Michigan Department of Treasury authorized to collect delinquent taxes owed to the State. **To avoid further collection activity, send your payment in full along with a copy of the State's notice in the enclosed envelope immediately.**

You have previously received a final demand letter from the Michigan Department of Treasury summarizing your account. If you have questions about your account, you should call the number listed above. This is an attempt to collect amounts due to the State and any information obtained will be used by GC Services Limited Partnership, only for that purpose.

For your convenience, you can now pay on the web at no additional charge by going to www.michigan.gov/collectionseservice

LT-91P-B (Rev. 09/13)
Letter G-1091 (MARCS)

Enclosures:
Attachment
Envelope